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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MARCUS S. SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Employees Liability Reform and Tort Compensation Act of 1988—which provides that the exclusive remedy for torts committed by federal employees acting within the scope of their employment is a suit against the United States under the Federal Tort Claims Act—is inapplicable when an exception to the Federal Tort Claims Act forecloses an award of damages against the United States.

PARTIES TO THE PROCEEDING

The petitioners are Dr. William Marshall, Jr., an Army physician, the original defendant below, and the United States of America, which was substituted as defendant by order of the district court.

The respondents, plaintiffs below, are Marcus S. Smith, Hildegard U. Smith, and Dominique Smith.

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v.

MARCUS S. SMITH, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America and William Marshall, Jr., M.D., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 885 F.2d 650. The oral opinion and order of the district court (App., *infra*, 15a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1989. A petition for rehearing was denied on January 25, 1990 (App., *infra*, 19a). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563-4567, and of the Gonzalez Act, 10 U.S.C. 1089, are set forth in an appendix (App., *infra*, 20a-31a).

STATEMENT

1. In *Westfall* v. *Erwin*, 484 U.S. 292 (1988), this Court held that federal employees are immune from liability for common law torts committed within the scope of their employment only if the relevant acts or omissions are discretionary in nature. The Court added, however, that Congress was "in the best position to provide guidance for the complex and often highly empirical inquiry into whether absolute immunity is warranted in a particular context" and that "[l]egislated standards governing the immunity of federal employees involved in state-law tort actions would be useful." *Id.* at 300. In response, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the Reform Act), Pub. L. No. 100-694, 102 Stat. 4563-4567. The Act's declared purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Section 2(b), 102 Stat. 4564.

To that end, the Reform Act makes the Federal Tort Claims Act the exclusive remedy for state-law torts committed by federal employees acting within the scope of their employment. Section 5 of the Reform Act provides (28 U.S.C. 2679(b)(1)):

> The remedy against the United States provided by [the FTCA, 28 U.S.C. 1346(b), 2672] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

The Act is triggered by a certification that a federal employee named as a defendant in a civil action "was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d). The Attorney General (or his designate) is authorized to issue such certifications. 28 U.S.C. 2679(d)(1)-(2). If the Attorney General declines to certify that an employee was acting within the scope of his or her employment, the employee may petition the court in which the suit is pending for such a certification. 28 U.S.C. 2679(d)(3). When the Attorney General or a court has made such a certification, the suit is deemed an action against the United States; the United States is substituted for the employee as the defendant; and, if the suit is pending in state court, it is removed to federal district court. 28 U.S.C. 2679(d)(1)-(3).

The Reform Act makes clear that once the United States has been substituted as the defendant, it may invoke all defenses that would have been available to it if the suit had initially been brought against it under the Federal Tort Claims Act. Upon certification that an employee was acting within the scope of his or her employment, an action initiated against the employee "proceed[s] in the same manner as any action against the United States filed pursuant to section 1346(b) of [Title 28] and [is] subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). Similarly, in addition to authorizing the government to assert judicial or legislative immunity if it would have been available to the employee originally named as the defendant, Section 4 of the Reform Act recognizes the government's right to "any other defenses to which the United States is entitled." 28 U.S.C. 2674.

2. This case is a medical malpractice action arising out of services performed by petitioner William Marshall, Jr., M.D., in his capacity as a military physician. At the time of the events giving rise to this action, respondent Marcus Smith was a United States Army Sergeant stationed in Italy. In 1982, his wife, respondent Hildegard Smith, was admitted to the United States Army hospital in Vicenza, Italy, where she gave birth to the Smiths' son, Dominique. Dr. Marshall participated in the delivery. Respondents' complaint alleges that, while acting within the scope of his duties as a military physician, Dr. Marshall was negligent and that this negligence resulted in severe injury to Dominique.

Respondents commenced this action in 1987 in the United States District Court for the Central District of California. The complaint named Dr. Marshall as the sole defendant and based federal jurisdiction on

diversity of citizenship. Invoking the Gonzalez Act, 10 U.S.C. 1089 (App., *infra*, 28a-31a), a statute predating the Reform Act that regulates the remedies available for malpractice by military physicians, the United States moved for an order substituting it for Dr. Marshall as the defendant and dismissing the action under 28 U.S.C. 2680(k). That FTCA exception bars suit against the United States on "[a]ny claim arising in a foreign country." The district court granted the motion. App., *infra*, 15a-18a.

3. While the case was pending in the court of appeals, Congress enacted the Reform Act. Section 8(b) made the Act's provisions applicable to "all claims, civil actions, and proceedings pending on * * * the date of [its] enactment." App., *infra*, 25a. Accordingly, in a supplemental brief filed with the court of appeals, the United States argued that the Reform Act required substitution of the United States for Dr. Marshall as the defendant and dismissal under 28 U.S.C. 2680(k)—the same disposition as the district court had ordered upon the authority of the Gonzalez Act.[1] In the same filing, based upon a review of the Gonzalez Act prompted by the Eleventh

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[1] Under the provisions of Section 6 of the Reform Act, 28 U.S.C. 2679(d)(1), substitution of the United States is normally based on an administrative certification that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." In the present case—in which the district court had ordered substitution pursuant to the Gonzalez Act prior to enactment of the Reform Act—the Department of Justice inadvertently neglected to issue a formal certification under Section 2679 during the pendency of the case in the courts below. A certification has recently been issued. It has never been disputed in this case that Dr. Marshall's actions were within the scope of his employment as an Army physician.

Circuit's decision in *Newman* v. *Soballe*, 871 F.2d 969 (1989), the government withdrew its reliance upon that statute.[2]

The court of appeals reversed, holding that neither the Gonzalez Act nor the Reform Act mandated the substitution of the United States for Dr. Marshall as the defendant in the action. App., *infra*, 1a-14a.

a. With respect to the Gonzalez Act, the court observed that, "[r]ead alone, section 1089(a) does not reveal whether its provisions apply to cases in which sections 1346(b) and 2672 of the FTCA do not provide an alternative remedy." App., *infra*, 4a. However, the panel continued, the "plain meaning" of Section 1089(f)—which authorizes indemnification of military physicians under specified situations (among them, the situation in which the doctor "is assigned to a foreign country")—is that "physicians will continue to be personally liable in the * * * situations specified." App., *infra*, 5a. The court found additional support for this conclusion in cases from other courts and in the legislative history of the Gonzalez Act. *Id.* at 6a-9a. We do not seek further review of this ruling.

[2] In *Newman*, a case decided after the entry of the district court's judgment in this case, the Eleventh Circuit held that the Gonzalez Act did not require substitution of the United States for a military physician sued for negligence committed abroad. The court relied principally on 10 U.S.C. 1089(f), which authorizes indemnification of military doctors held liable for malpractice committed abroad; in the court's view, this provision reflected an intention on the part of Congress to permit lawsuits against individual doctors when an FTCA exception foreclosed suit against the United States. See 871 F.2d at 971-977. Although there was a conflict among the courts of appeals on this question, compare *Jackson* v. *Kelly*, 557 F.2d 735, 740-741 (10th Cir. 1977); *Pelphrey* v. *United States*, 674 F.2d 243, 246 (4th Cir. 1982) (Gonzalez Act or equivalent statute does not require substitution of United States where FTCA exception is applicable), with *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987) (Gonzalez Act requires substitution and dismissal when suit against the United States is foreclosed), the government determined that it would not continue to invoke the Gonzalez Act in cases of this kind, and would thereafter rely solely on the Reform Act.

Dr. Marshall filed a request *pro se* that the court of appeals nevertheless consider the Gonzalez Act issue. See Request of William Marshall, Jr., In Propria Persona, Sept. 11, 1989.

b. The court of appeals also held that the Reform Act is "inapplicable to this case." App., *infra*, 10a. The court noted that Section 5 of the Reform Act, 28 U.S.C. 2675(b)(1), provides that "[t]he remedy against the United States" conferred by the FTCA "is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim" and that Section 2680(k) would preclude an action against the United States on petitioners' claim. App., *infra*, 10a-11a. Under these circumstances, the court reasoned, petitioners "have no remedy against the United States" under the FTCA and, consequently, the Reform Act "does not operate to provide Dr. Marshall with immunity." *Id.* at 11a.

The court found further support for this conclusion in the provisions of the Act dealing with employees of the Tennessee Valley Authority. In the court's view, those provisions extended to TVA employees immunity that had been withheld from government employees involved in tort claims arising in foreign countries. App., *infra*, 11a-12a.

The court described the Reform Act's legislative history as "somewhat contradictory." App., *infra*, 12a. On the one hand, the court understood the Act's declared purpose and statements from the House Report and individual members of Congress to suggest

that the Reform Act was not intended to withdraw any rights that an injured plaintiff might previously have had to pursue relief from an individual federal employee. *Ibid.* On the other hand, the court referred to a passage in the House Report stating that "suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery" and that "any claim against the government that is precluded by the exceptions set forth in [28 U.S.C. 2680] is precluded against an employee [or] his or her estate." *Id.* at 12a-13a (quoting H.R. Rep. No. 700, 100th Cong., 2d Sess. 6-7 (1988)). Dismissing the report as "internally inconsistent" (App., *infra*, 13a), the court adhered to its construction of the statutory language (*ibid.*).

4. The court denied a petition for rehearing and suggestion of rehearing *en banc* addressed to the Reform Act's application to this case. App., *infra*, 19a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the Reform Act does not apply—and thus exposes federal employees to suit in their individual capacity—whenever an exception to the Federal Tort Claims Act would preclude an award of damages against the United States. This ruling cannot be reconciled with the text of the Reform Act, its stated purpose, or legislative history addressing the precise point at issue. It also conflicts squarely with decisions of several other courts of appeals.

The question on which the Ninth Circuit has parted from other circuits is of great importance to the federal government. The Reform Act was passed because Congress found that the threat of individual liability resulting from this Court's decision in *Westfall* v. *Erwin*, *supra*, was impeding the ability of the

government to perform its responsibilities. The Ninth Circuit's interpretation of the Reform Act would renew that threat not only with respect to acts of federal employees in foreign countries, but also as to a wide variety of other potential claims, including those arising from such torts as defamation, misrepresentation, and interference with contractual relations, from the handling of mail, and from customs and tax matters. There are more than a half million civilian federal employees in the Ninth Circuit who are immediately exposed to liability by the court of appeals' decision. That decision is also likely to undercut the smooth and certain operation of the Reform Act in those circuits that have not yet passed on its applicability in this context.

1. a. The Ninth Circuit limited its analysis of the language of the Reform Act to the first sentence of Section 5 of the statute, 28 U.S.C. 2679(b)(1). That sentence states that "[t]he remedy against the United States" provided by the Federal Tort Claims Act for personal injury or property damage arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee * * * or against the estate of such employee." App., *infra*, 22a. In the court's view, this provision applies only when the FTCA provides a "remedy" against the United States that is not precluded by an exception to the FTCA. *Id.* at 11a. This reading of the text is strained on its own terms, but in any event is foreclosed by other provisions of the Act.[3]

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[3] See *United States* v. *Morton*, 467 U.S. 822, 828 (1984) ("We do not * * * construe statutory phrases in isolation; we read statutes as a whole.").

The very next sentence in Section 5 of the Reform Act directly contradicts the Ninth Circuit's construction. It provides that "[a]ny other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." Thus, the first sentence cannot be read to preserve the possibility of an action against the individual employee when suit against the United States is barred; such an action, which necessarily arises out of the "same subject matter" as an action against the United States, "is precluded." Read as a whole, Section 5 of the Act permits only one interpretation. A person injured by a federal employee acting within the scope of his or her employment has only one recourse: the "remedy" provided by the Federal Tort Claims Act in an action against the United States—whatever the extent of that remedy may be.

Two other provisions of the Act confirm this interpretation. Under Section 6, whenever the Attorney General or a court has certified that a federal employee who has been named as defendant in a suit was acting within the scope of his or her office or employment, "any [such] action or proceeding * * * shall proceed in the same manner as any action against the United States filed pursuant to [28 U.S.C. 1346(b)] and shall be subject to the limitations and exceptions applicable to those actions." 28 U.S.C. 2679(d)(4). The "limitations and exceptions" applicable to FTCA actions, of course, must include the exceptions enumerated in 28 U.S.C. 2680. As Section 4 of the Reform Act, 28 U.S.C. 2674, confirms, "[w]ith respect to any claim under [28 U.S.C. 2671-2680]," including those in which the United States has been substituted pursuant to a certification that an employee was within the scope of his employment, the United States may assert—in addition to any judicial and legislative immunity available to the employee involved—"any other defenses to which the United States is entitled."[4]

As both the Fifth and Tenth Circuits have concluded, the Reform Act's text compels the conclusion that—subject to the exceptions stated in Section 5 of the Act, 28 U.S.C. 2679(b)(2)—the statute applies to *all* tort suits against federal employees who have acted within the scope of their employment, whether or not a claim falls within an exception to the FTCA. *Mitchell* v. *Carlson*, 896 F.2d 128, 134-

[4] The court of appeals suggested that Section 9 of the Reform Act, 102 Stat. 4566, which deals with suits against TVA employees, supports its interpretation of the statute. However, it is clear that Section 9 merely provides protection for employees of the TVA parallel to that conferred on employees of the United States. Under that Section, an action against the TVA is the exclusive remedy for injuries allegedly inflicted by TVA employees acting within the scope of their employment; the TVA is responsible for issuing certifications on the scope of employment question; the TVA is substituted as the defendant; the action proceeds subject to limitations and exceptions applicable to suits against the TVA; and the TVA may assert any defenses to which it is entitled. Because Section 9 tracks the provisions of the Reform Act applicable to the United States (except that it provides for an exclusive remedy against the TVA, rather than the United States), it does not limit, expressly or by implication, the scope of those more general provisions. As the sponsor of the amendment adding Section 9 to the Reform Act explained, it "merely provides that the same protections enjoyed by Federal employees should be enjoyed by TVA employees." 134 Cong. Rec. S15,559 (daily ed. Oct. 12, 1988) (remarks of Sen. Heflin). The Fifth Circuit has rejected the inference that the Ninth Circuit drew from Section 9. *Mitchell* v. *Carlson*, 896 F.2d 128, 135 n.7 (5th Cir. 1990).

135 (5th Cir. 1990); *Aviles* v. *Lutz*, 887 F.2d 1046, 1049 (10 Cir. 1989). See p. 15, *infra*. The Reform Act makes a suit under the FTCA the exclusive remedy for injuries resulting from the actions of federal employees; precludes any other suit arising from the same subject matter; provides that the suit against the United States shall be subject to the limitations and exceptions of the FTCA; and preserves any defenses available to the United States in such actions. These provisions, most of which were not addressed in the court of appeals' opinion, foreclose that court's construction.

b. The Reform Act's legislative history, and legislative findings enacted as part of the Act, also speak to the precise point in question. The House Report states (H.R. Rep. No. 700, *supra*, at 6-7 (emphasis added)):[5]

> The "exclusive remedy" provision of Section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. *Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in* [*sic*] *his or her estate.* See *Edelman* v. *Federal Housing Administration*, 382 F.2d 594 (2d Cir. 1967); *Safeway Portland*

[5] This House Report was the only committee report accompanying the Reform Act. The Act was discussed only briefly on the floor of each House. See 134 Cong. Rec. H4718-H4719 (daily ed. June 27, 1988); *id.* at H4804 (daily ed. June 28, 1988); *id.* at S15,597-S15,600 (daily ed. Oct. 12, 1988); *id.* at H10,677-H10,678 (daily ed. Oct. 20, 1988).

> *E.F.C.U.* v. *Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir. 1974); *Vantrease* v. *United States*, 400 F.2d 853 (6th Cir. 1968); *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987).

Each of the cited cases held that a statute making an action against the United States the exclusive remedy for tort claims arising from the actions of specified individuals or agencies applied even when an exception to the Federal Tort Claims Act foreclosed any relief. The most authoritative legislative history unequivocally confirms the Reform Act's plain meaning.

This interpretation of the statute—that federal employees acting within the scope of their employment have complete immunity from state-law tort claims, including those to which the United States has a defense—is also consistent with the basic concerns underlying the enactment of the Reform Act. As we have noted, the Act was a response to this Court's decision in *Westfall* v. *Erwin*, *supra*. In findings enacted as part of the statute (App., *infra*, 20a), Congress declared that for many years prior to that decision, "Federal employees [had] been protected from personal common law tort liability by a broad based immunity" and thus "the Federal Tort Claims Act [had] served as the sole means for compensating persons injured by the tortious conduct of Federal employees." Congress understood the *Westfall* decision, however, to have "seriously eroded the common law tort immunity previously available to Federal employees." *Ibid.*

Noting the detrimental consequences for the government of personal exposure to tort liability, as well as this Court's suggestion that legislation would be "useful" (App., *infra*, 20a), Congress undertook to

"remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment" (H.R. Rep. No. 700, *supra*, at 4; see *id.* at 2). The Act's stated purpose was "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." App., *infra*, 21a. Under the Ninth Circuit's interpretation, the Act would fall short of this clearly expressed purpose.[6]

[6] None of the excerpts that the court of appeals quoted from the Act's legislative history supports that court's interpretation. For example, although the Act makes clear that its purpose includes providing persons injured by federal employees with "an appropriate remedy against the United States," the remainder of the Act and its legislative history establish that Congress considered the FTCA, subject to its exceptions and limitations, to constitute an "appropriate" (and fully sufficient) remedy. In its legislated findings, Congress determined that for many years "the Federal Tort Claims Act [had] served as the sole means for compensating persons injured by the tortious conduct of Federal employees" and that *Westfall* v. *Erwin*, *supra*, would "diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." App., *infra*, 20a, 21a. Similarly, the Ninth Circuit erred in relying on a statement in the House report that "no one who previously had the right to initiate a lawsuit will lose that right," H.R. Rep. No. 700, *supra*, at 7. That statement appears in a discussion of the effective date provisions of the Act; read in its context, it refers to provisions preserving claims that might otherwise have been jeopardized by the immediate applicability of such FTCA procedural requirements as the filing of an administrative claim. In *Mitchell* v. *Carlson*, 896 F.2d at 136, the Fifth Circuit reviewed the materials cited by the Ninth Circuit in this case and observed that "[i]solated language found scattered throughout the legislative history is insufficient persuasion

2. The Ninth Circuit's holding is in square conflict with decisions from other circuits. In *Aviles* v. *Lutz*, *supra*, the Tenth Circuit held that the Reform Act required the substitution of the United States for employees who had been sued for defamation and interference with contractual rights—even though suit against the United States was barred by an FTCA exception for such claims, 28 U.S.C. 2680(h). The court explained that the continued pursuit of the action against the individual defendants was "foreclosed by the plain language of [28 U.S.C. 2679] and its legislative history." 887 F.2d at 1049.

Similarly, in *Mitchell* v. *Carlson*, *supra*, the Fifth Circuit held that an action alleging assault and battery could not be pursued against an individual employee, even though suit against the United States was barred by 28 U.S.C. 2680(h). The court stated (896 F.2d at 134):

> [T]he mandate in § 5 of the [Reform Act] is clear. An action against a federal employee who has been certified as acting in the scope of her employment must proceed *exclusively* against the United States under the FTCA * * *. We must accept the clear mandate of the law. Since there is no remedy for assault and battery in the FTCA, Congress intended to leave a plaintiff such as Mitchell without a remedy for injuries sustained as a result of a federal employee's alleged assault and battery while in the course of employment.

In reaching this conclusion, the Fifth Circuit cited *Aviles* v. *Lutz*, *supra*, with approval. It also noted

that Congress intended to frustrate the very purpose of the [Reform Act], to protect its employees from the distraction and burden of litigation based upon their employment activities."

that its decision was in conflict with the Ninth Circuit's decision in this case; after reviewing the Ninth Circuit's reasoning, the *Mitchell* court "decline[d] to follow the Ninth Circuit case." 896 F.2d at 136.[7]

Two other decisions, from the Fifth and Eleventh Circuits, have applied the Reform Act to cases brought by employees against co-employees; in those cases, the remedy against the government is limited to benefits under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.* See *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989); *Lunsford* v. *Price*, 885 F.2d 236, 237-239 (5th Cir. 1989) (suit against TVA employees). These decisions, which held that injured claimants who had no remedy in tort against the government were also barred from suing individual employees, are inconsistent with the reasoning of the court of appeals in this case.

Finally, in an analogous case, *Springer* v. *Bryant*, No. 89-7272 (Apr. 2, 1990), the Eleventh Circuit held that Section 9 of the Reform Act required dismissal of a wrongful death action commenced against TVA employees. Even though under Alabama law such an action is deemed punitive in character, and thus foreclosed by the TVA's sovereign immunity from punitive damages, the court held that suit could not be pursued against the employees. It observed

[7] Two other courts of appeals have applied the Reform Act to cases in which FTCA exceptions bar suit against the United States, albeit without discussing the question whether the Act mandates that result. See *Jordan* v. *Hudson*, 879 F.2d 98 (4th Cir. 1989) (discretionary function exception of 28 U.S.C. 2680(a)); *Moreno* v. *Small Business Administration*, 877 F.2d 715 (8th Cir. 1989) (claims of defamation and interference with contract, both of which are within the exception of 28 U.S.C. 2680(h)).

that the purpose of the Reform Act was "to create absolute immunity for federal employees who, within the scope of their employment, commit common law torts." [8]

[8] District courts in two other circuits have also reached results consistent with our position. See *McDonald* v. *Hassard*, 89-2 U.S. Tax Cas. (CCH) ¶ 9561 (D. Me. July 13, 1989) (ordering substitution despite applicability of tax and customs exception of 28 U.S.C. 2680(c)); *Gogek* v. *Brown University*, 729 F. Supp. 926 (D.R.I. 1990) (same; contract interference claim barred by 28 U.S.C. 2680(h)); *Verma* v. *United States*, No. 87-2294 (D.D.C. July 24, 1989) (same; recovery barred by *Feres* doctrine).

Other district courts have, like the Ninth Circuit, refused to apply the Reform Act where the result would be dismissal of the suit. *Nasuti* v. *United States*, No. 89-774-N (D. Mass. July 25, 1989), appeal pending, No. 89-1830 (1st Cir.); *Dagnan* v. *Gouger*, No. CIV-1-88-452 (E.D. Tenn. July 18, 1989). The *Dagnan* opinion was subsequently vacated pursuant to a settlement.

In *Newman* v. *Soballe*, 871 F.2d 969 (1989), the Eleventh Circuit held that neither the Reform Act nor the Gonzalez Act required the substitution of the United States for a military physician sued for alleged malpractice abroad. There is language in the opinion that is consistent with the Ninth Circuit's interpretation of the Reform Act in this case; the Eleventh Circuit stated that the Reform Act "only applies in situations where the FTCA itself would apply" and that the FTCA does not apply to cases subject to an FTCA exception such as the foreign-tort exception, 28 U.S.C. 2680(k). 871 F.2d at 971. However, particularly in light of the Eleventh Circuit's subsequent decisions in *Springer* v. *Bryant*, *supra*, and *Sowell* v. *American Cyanamid*, *supra*, the *Newman* decision is now most fairly read to turn on a narrower, alternative ground—that employees covered by the Gonzalez Act are not affected by the Reform Act. See 871 F.2d at 971.

We address the potential applicability of that ground to this case below. See pp. 20-22, *infra*.

3. The certain and uniform application of the Reform Act is of great importance to the federal government. Congress enacted that legislation less than a year after this Court's decision in *Westfall* v. *Erwin*, *supra*, having found that the absence of complete immunity for federal employees had "created an immediate crisis involving the prospect of personal liability" and that this prospect would "seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts." Pet. App. 21a.

The Ninth Circuit's holding severely undercuts the efficacy of the solution that Congress devised for this crisis. There are a number of exceptions to FTCA liability. For example, 28 U.S.C. 2680(b) and (c) preclude the imposition of liability on the United States for claims arising out of the miscarriage of mail, the collection of taxes, and the detention of goods in custody. Under the court of appeals' analysis, individual postal or customs workers will be exposed to the threat of suits in their individual capacity for such matters, based on simple negligence. Similarly, federal employees would be subject to personal suit on claims of the types enumerated in 28 U.S.C. 2680(h), such as misrepresentation, defamation, or interference with contract rights.

Exposing employees to suits of this type will do much to restore the threat that the Reform Act was designed to remove. Given the advantages to the ordinary plaintiff of bringing suit against the government, it is fair to assume that most individuals who sue federal employees do so because there is a legal obstacle to an action against the United States.

The Ninth Circuit's refusal to apply the Reform Act to suits of that type thus would deprive federal employees of protection where it is most needed. And, as Congress noted when it enacted the Reform Act, the threat of these suits falls most heavily on " 'rank and file' workers" who cannot establish that their acts were discretionary within the meaning of *Westfall* v. *Erwin*, *supra*. H.R. Rep. No. 700, *supra*, at 3.

Unless further review is granted, the immediate effects of the court of appeals' ruling are likely to be severe. Over half a million civilian federal workers are employed in the states comprising the Ninth Circuit.[9] Those employees now face the prospect of personal liability in circumstances where their counterparts in other states would enjoy the protection of the Reform Act. Moreover, in those circuits that have not passed upon the applicability of the Reform Act, the decision in this case seems likely to inspire filings against individual employees and to interfere with the Reform Act's effective operation. The Reform Act's procedures are designed to assure that if individual employees are sued, the question whether they have acted within the scope of their employment will be quickly and surely resolved and the United States will be substituted at the outset of the litigation. The conflict created by the Ninth Circuit's decision will interfere with the smooth and certain application of those provisions.

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[9] See United States Office of Personnel Management, *Federal Civilian Workforce Statistics: Biennial Report of Employment by Geographic Areas* 21 (Dec. 31, 1988). This figure does not include military personnel stationed in those states, who would also be affected by the court of appeals' ruling.

Finally, this is an issue on which nationwide uniformity is particularly important. There is no reason why a federal employee's exposure to personal liability should turn on the place of employment.

4. Because the Ninth Circuit held that the Reform Act does not apply to cases in which the foreign tort exception bars a suit against the United States, it did not reach the question whether the Act applies to military physicians who are also subject to the provisions of the Gonzalez Act. In *Newman* v. *Soballe*, *supra*, the Eleventh Circuit concluded that the Reform Act does not apply in that context; it explained that "[a]s a military physician, Dr. Soballe is specifically protected by the Gonzalez Act and is therefore not among those federal employees affected by the *Westfall* decision or the [Reform Act]." 871 F.2d at 971. This potential alternative basis for affirming the court of appeals judgment does not affect the suitability of this case for further review.

First, the court of appeals did not dispose of the case on that basis. It did not hold that the Reform Act was superseded by the Gonzalez Act; rather, it construed the Reform Act to be inapplicable on its own terms. For the reasons set forth above, that interpretation of the Reform Act warrants this Court's attention on its own merits.

Second, the Reform Act should not be construed to draw a distinction between military medical personnel (and others to whom statutes similar to the Gonzalez Act apply) and other federal employees.[10]

[10] In addition to the Gonzalez Act, which covers military medical personnel, there are comparable statutes covering medical personnel of the State Department, 22 U.S.C. 2702, the Veterans Administration, 38 U.S.C. 4116, NASA, 42 U.S.C. 2458a, and the Public Health Service, 42 U.S.C. 233. An analogous statute protects legal personnel of the Department of Defense from legal malpractice liability. 10 U.S.C. 1054.

By its terms, Section 5 of Reform Act, 28 U.S.C. 2679(b)(1), extends to "any employee of the Government," a group that unquestionably includes military physicians. The legislative history suggests that Congress believed it was conferring the same protection on federal employees generally that military medical employees already enjoyed. H.R. Rep. No. 700, *supra*, at 4. It would thus be ironic and unwarranted now to hold that those medical personnel enjoy less protection from individual actions than their counterparts in the federal service.[11]

Moreover, there is a provision of the Reform Act that specifically defines those remedies against in-

[11] When the House Report on the Reform Act noted the legislation's intention that "any claim against the government that is precluded by the exceptions set forth in [28 U.S.C. 2680] is also precluded against an employee [or] his or her estate," it cited *Powers* v. *Schultz*, *supra*, with approval. In that case, the Fifth Circuit held—contrary to the Ninth Circuit's ruling and the government's concession in this case—that the Gonzalez Act "makes suit against the United States the *only* remedy for negligent acts of a military physician acting within the scope of his duties, regardless of whether suit is foreclosed on other grounds, be it the absence of liability * * *, or the foreign-country exception to the FTCA, as here." 821 F.2d at 298.

Whether or not the Committee Report was "correct" in its understanding of the Gonzalez Act, it confirms the intention of the Reform Act to create a uniform regime for *all* federal employees, including those in Dr. Marshall's position in this case. It was not Congress's intention to confer on a plaintiff a greater right to sue a government employee for injury occurring overseas if the injury was caused by an Army surgeon than that plaintiff would have if the injury was caused by an Army truck driver.

dividual employees that are excluded from its coverage. Under 28 U.S.C. 2679(b)(2), the Reform Act is not applicable to actions against individuals for violation of constitutional rights or to actions "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." In this case, Dr. Marshall has not been sued for a "violation" of the Gonzalez Act, and thus the action is not authorized by the express limitations on the Reform Act. See H.R. Rep. 700, *supra*, at 7. Particularly in view of the fact that the Reform Act specifies categories of cases to which it does not apply, there is no room for the implied exception found by the Eleventh Circuit in *Newman* v. *Soballe*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 88-5757

MARCUS S. SMITH; HILDEGARD U. SMITH,
PLAINTIFFS-APPELLANTS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California

Argued and Submitted Dec. 9, 1988
Decided Sept. 26, 1989

Before: HALL, WIGGINS and THOMPSON, Circuit Judges

DAVID R. THOMPSON, Circuit Judge:

This is a medical malpractice suit against a military physician. Jurisdiction in the district court was founded on diversity of citizenship. The case presents two questions never addressed by this circuit: (1) whether an American military physician working in a foreign country is immune from a malprac-

tice suit under 10 U.S.C. § 1089 (1982)[1] and (2) whether the physician is immune from suit under the recently enacted Federal Employees Liability Reform and Tort Compensation Act of 1988 ("FELRTCA"). FELRTCA, Pub. L. No. 100-694, 102 Stat. 4563 (1988). The district court dismissed the complaint against the physician, substituted the United States as a defendant, and then dismissed the action. We have jurisdiction under 28 U.S.C. § 1291. We reverse.

FACTS AND PROCEDURAL HISTORY

Sergeant Marcus Smith was stationed in Italy. William Marshall, M.D. worked as a military physician in the Army medical facility in Vicenza, Italy. He treated Hildegard Smith, Sergeant Smith's wife, during the birth of the Smiths' son, Dominique. The Smiths allege that, as a result of Dr. Marshall's negligence, Dominique sustained massive brain damage.

After the briefs were filed in this appeal, Congress enacted the FELRTCA. FELRTCA's purpose is "to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." FELRTCA 2(b), 102 Stat. at 4564. FELRTCA applies to all actions pending on the date of its enactment and is therefore relevant in this appeal. FELRTCA § 8(b), 102 Stat. at 4565-66.

10 U.S.C. § 1089

In the district court, the government argued that 10 U.S.C. § 1089(a) gives the military physician,

[1] Section 1089 is often referred to as the "Gonzalez Act."

Dr. Marshall, absolute immunity from the Smiths' malpractice suit, even though the Smiths have no claim against the government under the Federal Tort Claims Act ("FTCA").[2] The Smiths have no FTCA action because their claim arose in a foreign country. 28 U.S.C. § 2680(k) (1982).

After oral argument, the government filed a supplemental brief in which it abandoned its argument that immunity for Dr. Marshall exists by virtue of section 1089(a). The government did so based upon the Eleventh Circuit's decision in *Newman v. Soballe*, 871 F.2d 969, 970 (11th Cir. 1989). *Newman* was decided after oral argument in the present case. The government now relies solely on FELRTCA to support its contention that Dr. Marshall is entitled to immunity. We discuss FELRTCA later in this opinion.

In view of an apparent split among the circuits on the section 1089(a) issue,[3] considering the importance of the issue, the absence of any controlling Ninth Circuit authority, and because the district court relied on the government's section 1089(a) argument and the parties have briefed and argued the question, we address and resolve the section 1089(a) issue in this appeal.

"[T]he starting point for interpreting a statute is the language of the statute itself." *Consumer Prod.*

[2] For convenience, we use the term "FTCA" to refer to 28 U.S.C. §§ 2671-2680 prior to the FELRTCA amendments.

[3] *Compare Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir.1987) (military doctor immune), *with Newman v. Soballe*, 871 F.2d 969, 970 (11th Cir.1989) (doctor not immune), *and Jackson v. Kelly*, 557 F.2d 735, 740-41 (10th Cir.1977) (en banc) (same), *and Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir.1982) (same).

Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Section 1089(a) provides in relevant part:

> (a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act of [*sic*] omission of any physician . . . or [*sic*] the armed forces, . . . while acting within the scope of his duties or employment therein or therefor shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician . . . whose act or omission gave rise to such action or proceeding.

10 U.S.C. § 1089(a) (Supp. I 1984).

Read alone, section 1089(a) does not reveal whether its provisions apply to cases in which sections 1346(b) and 2672 of the FTCA do not provide an alternative remedy.[4] But section 1089(a) is just part of the statute. Section 1089(f) gives the relevant agency head the power to indemnify or provide insurance for a military physician in three specific situations; when the physician is: (1) serving in a foreign country, (2) assigned to work for an organization which is not part of the federal government, or (3) in such circumstances as are likely to preclude

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[4] 28 U.S.C. § 1346(b) gives the district courts exclusive jurisdiction over claims arising under the tort claims procedure chapter of title 28. 28 U.S.C. § 2672 gives top agency officials the power to adjust and settle federal tort claims. Neither statute applies to claims arising in a foreign country. 28 U.S.C. § 2680(k) (1982).

the remedies of third persons under the FTCA.[5] The plain meaning of section 1089(f) is that physicians will continue to be personally liable in the three situations specified. If section 1089(a) gives military physicians total immunity, section 1089(f)'s indemnification provisions are virtually meaningless. *See Newman v. Soballe*, 871 F.2d 969, 974 (11th Cir. 1989); *Anderson v. O'Donoghue*, 677 P.2d 648, 651 (Okla. 1983); *cf. Jackson v. Kelly*, 557 F.2d 735, 740 (10th Cir. 1977) (en banc). We must interpret section 1089 as a whole and try to give full effect to all of its subsections. *See United States v. Fields*, 783 F.2d 1382, 1384 (9th Cir. 1986); *see also Newman*, 871 F.2d at 974 ("Because subsection (f) was written into the Gonzalez Act, we are required to give it meaning.").

The government initially argued in the district court that section 1089(f) is not superfluous because the section protects medical personnel serving abroad when they are sued in foreign courts. *See Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987). This argument has two flaws.

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[5] Section 1089(f) provides in relevant part:

> (f) The head of the agency concerned may . . . hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical . . . functions . . . while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the remedies of third persons against the United States described in section 1346(b) of title 28, for such damages or injury.

10 U.S.C. § 1089(f) (Supp. I 1984).

First, this interpretation is unnecessarily contrived. Nothing in section 1089(f) even hints at the possibility that any of its provisions only apply to suits brought in foreign courts. And we doubt that Congress intended to require victims of alleged military medical malpractice to bring suit in foreign courts to secure judicial relief. *See Newman*, 871 F.2d at 975, 976-77 & n.12.

Second, the government's previous construction of section 1089(f), which it asserted in the district court and before this court, fails to account for section 1089(f)'s other provisions. These provisions allow agency heads to indemnify or provide insurance for medical personnel who are detailed for service outside the federal government or are in circumstances likely to prevent third persons from obtaining relief under the FTCA. *See Newman*, 871 F.2d at 977; *cf. Anderson*, 677 P.2d at 651 (discussing section 1089(f)'s provisions for service outside the federal government).

We conclude that section 1089(a) does not give Dr. Marshall immunity from the Smiths' suit. This conclusion is consistent with the position adopted by a majority of courts which have interpreted section 1089. *See Newman*, 871 F.2d at 970; *Pelphrey v. United States*, 674 F.2d 243, 246 (4th Cir. 1982); *Jackson*, 557 F.2d at 740; *Burchfield v. Regents of University of Colorado*, 516 F. Supp. 1301, 1304 (D. Colo. 1981); *Anderson*, 677 P.2d at 651.

We have also reviewed section 1089's legislative history and conclude that Congress did not intend to leave people like the Smiths without a judicial remedy in this country. *See, e.g.*, S.R. Rep. No. 94-1264, 94th Cong., 2d Sess. 9-10, 13-14, *reprinted in* 1976 U.S. Code Cong. & Admin. News 4443, 4451, 4454-

55; *Newman*, 871 F.2d at 972-73; *Jackson*, 557 F.2d at 740.

Cases interpreting statutes which do not have a provision analogous to section 1089(f) are inapposite. *Cf. Newman*, 871 F.2d at 974 ("the allegedly analogous statutes relied on by the government do not have the equivalent of subsection (f)"). Only three of the cases previously cited by the government merit separate discussion. *Powers v. Schultz*, 821 F.2d 295, 297 (5th Cir. 1987); *Heller v. United States*, 776 F.2d 92 (3d Cir. 1985), *cert. denied*, 476 U.S. 1105, 106 S.Ct. 1948, 90 L.Ed.2d 358 (1986); *Baker v. Barber*, 673 F.2d 147, 148 (6th Cir. 1982) (per curiam). All three cases are distinguishable.

Heller is clearly inapposite. The *Heller* court never reached the question whether a physician serving abroad was immune from suit because the plaintiff was unable to serve any of the individual defendants. *Heller*, 776 F.2d at 95 n.2; *see Newman*, 871 F.2d at 975-76 (distinguishing *Heller* on the same grounds).

Baker is distinguishable for at least two reasons. First, *Baker* involved the construction and harmonization of three statutes: section 1089, the FTCA and the Federal Employee Compensation Act ("FECA"). 673 F.2d at 148. The FECA provides that the "liability of the United States . . . is exclusive and instead of all other liability of the United States . . . under a Federal tort liability statute." 5 U.S.C. § 8116(c) (1982). In *Baker*, the plaintiff was eligible for benefits under the FECA. *Baker*, 673 F.2d at 148. The present case does not involve the FECA.

Second, in *Baker*, a key issue was whether FECA cases qualified under the "circumstances likely to preclude" language of section 1089(f) so that suit could be brought against the Army physician defend-

ants. The Sixth Circuit concluded that the "circumstances" language was inapplicable to create the FECA exception for which the plaintiff contended.

> Congress was aware that federal employees are treated at times by military doctors. Because Congress declined to include [the FECA] situation *in the section of the bill in which it listed other specific exceptions*, this Court will not read the "circumstances" language to exempt from the malpractice immunity statute suits by federal employees.

Baker, 673 F.2d at 150 (emphasis added). Contrary to *Baker*, the case presently before us involves the specific "foreign country" exception of section 1089(f).

In *Powers v. Schultz*, 821 F.2d 295, 297-98 (5th Cir. 1987), the plaintiff sued a military doctor for malpractice which allegedly occurred in a foreign country. The Fifth Circuit held that section 1089(a) and the FTCA barred the suit. "When suit falls [under section 1089(a)] and there can be no recovery [under the FTCA], the plaintiff has reached the end of the line." *Powers*, 821 F.2d at 298 (quoting *Jones v. Newton*, 775 F.2d 1316, 1318 (5th Cir. 1985)); *see also* 28 U.S.C. § 2680(k). The Fifth Circuit dismissed the suit.

Powers is distinguishable. The plaintiff-appellant in *Powers* did not contest "the substitution of the United States as party defendant or . . . the district court's holding that the United States is immune from suit." 821 F.2d at 296. In this case, the propriety of substituting the United States as defendant is a central issue. *See Newman*, 871 F.2d at 975 (distinguishing *Powers* on the same basis). Furthermore, *Powers*' authority is undercut by the

court's failure to discuss or distinguish cases such as *Jackson* or *Pelphrey* which appear to directly conflict with the result in *Powers*. To the extent that our opinion is inconsistent with *Powers*, we respectfully decline to follow it.

Our review of section 1089's statutory language, its legislative history, and the relevant case law convinces us that section 1089(a) does not provide a military medical doctor with immunity from suit for medical malpractice which occurs in a foreign country. We now consider whether Dr. Marshall has immunity under FELRTCA.

FELRTCA

The government argues that FELRTCA, an act amending the FTCA, provides an independent source of immunity for Dr. Marshall. The pertinent portions of FELRTCA provide:

> SEC. 5. EXCLUSIVENESS OF REMEDY.
>
> Section 2679(b) of title 28, United States Code, is amended to read as follows:
>
> "(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against

the employee or the employee's estate is precluded without regard to when the act or omission occurred. . . ."

SEC. 6. REPRESENTATION AND REMOVAL.

Section 2679(d) of title 28, United States Code, is amended to read as follows:

"(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. . . ."

"(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions. . . ."

FELTRCA §§ 5-6, 102 Stat. at 4564-65.

We conclude that FELRTCA is inapplicable to this case.

FELRTCA provides that "[t]he remedy against the United States . . . is exclusive of any other civil action or proceeding for money damages . . . against the employee whose act or omission gave rise to the claim. . . ." FELRTCA § 5, 102 Stat. at 4564 (to be codified at 28 U.S.C. § 2679(b)(1)). The foreign country exception to the FTCA exempts the United States from liability on "[a]ny claim arising in a

foreign country." 28 U.S.C. § 2680(k). When Congress enacted FELRTCA it did not amend the FTCA's section 2680(k). FELRTCA is part of the FTCA, and thus the foreign country exception of section 2680(k) remains to preclude an action against the United States on a claim arising in a foreign country. The claim in the present case arose in Italy. The Smiths, therefore, have no remedy against the United States. Because they do not, FELRTCA does not operate to provide Dr. Marshall with immunity.

Had Congress intended to extend FELRTCA immunity to individual government employees for tort claims arising in foreign countries it could have done so quite easily. Indeed, this is just what Congress did with regard to claims against Tennessee Valley Authority employees. Under FTCA, the United States is exempt from liability on "[a]ny claim arising from the activities of the Tennessee Valley Authority." 28 U.S.C. § 2680(*l*). In enacting FELRTCA, Congress included a specific section which provides that "[a]n action against the Tennessee Valley Authority for . . . personal injury or death arising from the negligent . . . act or omission of any employee of the Tennessee Valley Authority while acting within the scope of . . . employment is exclusive of any other civil action or proceeding . . . against the employee." FELRTCA § 9, 102 Stat. at 4566-67. The fact that Congress felt it necessary to specifically mention TVA employees in FELRTCA, strongly suggests that Congress believed that absent specific language in FELRTCA extending FELRTCA immunity to TVA employees, these employees would remain without immunity following the enactment of FELRTCA. *Cf.* 10 U.S.C. § 1089(e)

(modifying the effect of section 2680's assault and battery exception in cases of military malpractice).

Unfortunately, FELRTCA's legislative history is somewhat contradictory. On the one hand, the general purpose of FELRTCA is clear. "It is the purpose of [FELRTCA] to protect Federal employees from personal liability for common law torts committed within the scope of their employment, *while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.*" FELRTCA § 2(b), 102 Stat. at 4564 (emphasis added). And the House Committee emphasized that under FELRTCA "no one who previously had the right to initiate a lawsuit will lose that right." H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S. Code Cong. & Admin. News 5945, 5951; *see also* 134 Cong. Rec. H4719 (daily ed. June 27, 1988) (remarks of Rep. Wolf) ("In no way does this measure infringe or diminish any legal rights of the individual."); *id.* at S15599-600 (daily ed. Oct. 12, 1988) (remarks of Sen. Grassley); *id.* at S15511-12 (daily ed. Oct. 11, 1988) (remarks of Sen. Humphrey). These legislative statements support our conclusion that FELRTCA did not take away the Smiths' cause of action against Dr. Marshall.

On the other hand, the following statement appears in the House Report:

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in [sic] his or her estate. See *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2d Cir.1967); *Safeway Portland E.F.C.U. v. Federal Deposit Insurance Corporation*, 506 F.2d 1213 (9th Cir.1974); *Vantrease v. United States*, 400 F.2d 853 (6th Cir. 1968); *Powers v. Schultz*, 821 F.2d 295 (5th Cir.1987).

H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 6-7, 1988 U.S. Code Cong. & Admin. News 5945, 5950. The report does not mention the foreign country exception specifically. The report cites *Powers v. Schultz*, a case to distinguish and decline to follow, but does not discuss cases such as *Jackson* and *Pelphrey* which conflict with *Powers*.

We cannot reconcile the report's promise that the rights of individual claimants would not be diminished, with the assertion that "any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee in [sic] his or her estate." H.R.Rep. No. 100-700, 100th Cong., 2d Sess. 6-7, 1988 U.S. Code Cong. & Admin. News 5945, 5950-51. We conclude that the report is internally inconsistent. But the statutory language is not. And we join the Eleventh Circuit in holding that FELRTCA does not bar medical malpractice claims brought against military personnel serving abroad. *Newman*, 871 F.2d at 971.

CONCLUSION

We reverse the district court's orders which dismissed the medical malpractice claim against Dr.

Marshall, and which substituted the United States for Dr. Marshall and dismissed the action. We remand for further proceedings.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-05477 TJH

MARCUS S. SMITH, ETC., ET AL., PLAINTIFFS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT

(Jan. 11, 1988)

REPORTER'S TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA

THE HONORABLE TERRY J. HATTER, Judge Presiding

• • • •

"THE COURT: All right. I think your position is well articulated. You point out the decision rendered by Judge Kenyon and perhaps that will aid the Ninth Circuit in reaching some decision here because I'm finding just the opposite, as harsh as that result is, particularly where we have a brain damaged child. In this case, reluctantly I have no other recourse but to follow the law as I interpret it and the Gonzales Act requires that the United States be substituted when there is an immunity suit for claims arising in foreign countries and the remedy that is available was the administrative claim. Two years in which to file such was not done. The statute of limitations would apply there as well.

I'm going to grant the government's motion and ask that the government prepare the proposed order. Thank you.

(Proceedings concluded)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Edythe Schwartz
EDYTHE SCHWARTZ
Court Reporter

1/19/88
Date

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF
CALIFORNIA

No. CV 87-5477-TJH(GHKx)

MARCUS S. SMITH, ETC., ET AL, PLAINTIFFS

v.

WILLIAM MARSHALL, JR., M.D., DEFENDANT

[Filed Jan. 14, 1988]

ORDER GRANTING DEFENDANT'S MOTIONS TO SUBSTITUTE THE UNITED STATES AS DEFENDANT AND TO DISMISS

The motions to substitute the United States as defendant and to dismiss of defendant William Marshall, Jr., M.D. came on for hearing on January 11, 1988 before the Honorable Terry J. Hatter, Jr., United States District Judge. Plaintiffs were represented by Walter A. Oleniewski, Esq. of the law firm of Shulman, Rogers, Gandal, Pordy & Ecker, and Alan Rubin, Esq. Defendant was represented by Nikki Calvano, Trial Attorney, U.S. Department of Justice, Torts Branch, Civil Division and Shari K. Silver, Assistant United States Attorney. This Court has fully considered the papers filed by the parties in connection with the motions and the oral argument of counsel, and for the reasons stated in open Court on January 11, 1988,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion to substitute the United States as defendant pursuant to 10 U.S.C. § 1089(a) is granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. §§ 2680(k) and 2401 (b) is granted.

IT IS FURTHER ORDERED that defendant recover its costs of suit from plaintiffs.

DATED: This 13th day of January, 1988.

/s/ Terry J. Hatter, Jr.
TERRY J. HATTER, JR.
United States District Judge

Presented By:

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Shari K. Silver
SHARI K. SILVER
Assistant United States Attorney
Attorneys for Defendant
United States of America

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-5757

D.C. No. CV-87-5477-TJH

MARCUS S. SMITH; HIDEGARD U. SMITH,
PLAINTIFFS-APPELLANTS

vs.

WILLIAM MARSHALL, JR., M.D.,
DEFENDANT-APPELLEE

[Filed Jan. 25, 1990]

ORDER

Before: HALL, WIGGINS and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX E

STATUTORY PROVISIONS INVOLVED

Section 2 of the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, 102 Stat. 4563 [the Reform Act], provides:

(a) **Findings.**—The Congress finds and declares the following:

(1) For more than 40 years the Federal Tort Claims Act has been the legal mechanism for compensating persons injured by negligent or wrongful acts of Federal employees committed within the scope of their employment.

(2) The United States, through the Federal Tort Claims Act, is responsible to injured persons for the common law torts of its employees in the same manner in which the common law historically has recognized the responsibility of an employer for torts committed by its employees within the scope of their employment.

(3) Because Federal employees for many years have been protected from personal common law tort liability by a broad based immunity, the Federal Tort Claims Act has served as the sole means for compensating persons injured by the tortious conduct of Federal employees.

(4) Recent judicial decisions, and particularly the decision of the United States Supreme Court in Westfall v. Erwin, have seriously eroded the common law tort immunity previously available to Federal employees.

(5) This erosion of immunity of Federal employees from common law tort liability has created an immediate crisis involving the prospect of personal liability and the threat of protracted personal tort litigation for the entire Federal workforce.

(6) The prospect of such liability will seriously undermine the morale and well being of Federal employees, impede the ability of agencies to carry out their missions, and diminish the vitality of the Federal Tort Claims Act as the proper remedy for Federal employee torts.

(7) In its opinion in Westfall v. Erwin, the Supreme Court indicated that the Congress is in the best position to determine the extent to which Federal employees should be personally liable for common law torts, and that legislative consideration of this matter would be useful.

(b) **Purpose.**—It is the purpose of this Act to protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States.

Section 4 of the Reform Act, 28 U.S.C. 2674, provides:

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose

act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

Sections 5 and 6 of the Reform Act amend 28 U.S.C. 2679(b) and (d) to provide:

> (b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> > (A) which is brought for a violation of the Constitution of the United States, or
> >
> > (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.
>
> * * * * *

> (d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> (2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.
>
> (3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or pro-

ceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1),(2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

(A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

Section 8(a)-(b) of the Reform Act, 102 Stat. 4565-4566, provides:

(a) **General Rule.**—This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) **Applicability to Proceedings.**—The amendments made by this Act shall apply to all claims, civil actions, and proceedings pending on, or filed on or after, the date of the enactment of this Act.

Section 9 of the Reform Act, 102 Stat. 456b-4567, 16 U.S.C. 831c-2 and 28 U.S.C. 2674, provides:

(a) **Exclusiveness of Remedy.**—(1) An action against the Tennessee Valley Authority for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Tennessee Valley Authority while acting within the scope of this office or employment is exlusive [*sic*] of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim. Any other civil action or proceeding arising out of or relating to the same subject matter against the employee or his estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a cognizable action against an employee of the Tennessee Valley Authority for money damages

for a violation of the Constitution of the United States.

(b) **Representation and Removal.**—(1) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding heretofore or hereafter commenced upon such claim in a United States district court shall be deemed an action against the Tennessee Valley Authority pursuant to 16 U.S.C. 831c(b) and the Tennessee Valley Authority shall be substituted as the party defendant.

(2) Upon certification by the Tennessee Valley Authority that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place wherein it is pending. Such action shall be deemed an action brought against the Tennessee Valley Authority under the provisions of this title and all references thereto, and the Tennessee Valley Authority shall be substituted as the party defendant. This certification of the Tennessee Valley Authority shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Tennessee Valley Authority has refused to certify scope of office or employment under this section, the employee

may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action shall be deemed an action brought against the Tennessee Valley Authority, and the Tennessee Valley Authority shall be substituted as the party defendant. A copy of the petition shall be served upon the Tennessee Valley Authority in accordance with the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Tennessee Valley Authority to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any actions subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the Tennessee Valley Authority and shall be subject to the limitations and exceptions applicable to those actions.

(c) **Retention of Defenses.**—Section 2674 of title 28, United States Code, is amended by adding at the end thereof the following new paragraph:

"With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee

based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.".[1]

The Gonzalez Act, 10 U.S.C. 1089, provides:

Defense of certain suits arising out of medical malpractice

(a) The remedy against the United States provided by sections 1346(b) and 2672 of title 28 for damages for personal injury, including death, caused by the negligent or wrongful act or omission of any physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (including medical and dental technicians, nursing assistants, and therapists) of the armed forces, the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, the Department of Defense, the United States Soldiers' and Airmen's Home, or the Central Intelligence Agency in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of his duties or employment therein or therefor

[1] The inclusion of this section in 28 U.S.C. 2674 and the reference to the Federal Tort Claims Act ("this chapter") were the result of a drafting error that Congress sought to correct but that was nevertheless carried forward into the Act as enacted. See *Lunsford* v. *Price*, 885 F.2d 236 (5th Cir. 1989); *Springer* v. *Bryant*, No. 89-7272 (11th Cir. Apr. 2, 1990); 134 Cong. Rec. H10,678 (daily ed. Oct. 20, 1988).

shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against such physician, dentist, nurse, pharmacist, or paramedical or other supporting personnel (or the estate of such person) whose act or omission gave rise to such action or proceeding.

(b) The Attorney General shall defend any civil action or proceeding brought in any court against any person referred to in subsection (a) of this section (or the estate of such person) for any such injury. Any such person against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon such person or an attested true copy thereof to such person's immediate superior or to whomever was designated by the head of the agency concerned to receive such papers and such person shall promptly furnish copies of the pleading and process therein to the United States attorney for the district embracing the place wherein the action or proceeding is brought, to the Attorney General and to the head of the agency concerned.

(c) Upon a certification by the Attorney General that any person described in subsection (a) was acting in the scope of such person's duties or employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the District Court of the United States of the district and division embracing the place wherein it is pending and the proceeding deemed a tort action brought

against the United States under the provisions of title 28 and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (a) of this section is not available against the United States, the case shall be remanded to the State court.

(d) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677 of title 28, and with the same effect.

(e) For purposes of this section, the provisions of section 2680(h) of title 28 shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations).

(f) The head of the agency concerned may, to the extent that the head of the agency concerned considers appropriate, hold harmless or provide liability insurance for any person described in subsection (a) for damages for personal injury, including death, caused by such person's negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) while acting within the scope of such person's duties if such person is assigned to a foreign country or detailed for service with other than a Federal department, agency, or instrumentality or if the circumstances are such as are likely to preclude the

remedies of third persons against the United States described in section 1346(b) of title 28, for such damage or injury.

(g) In this section, the term "head of the agency concerned" means—

(1) the Director of Central Intelligence, in the case of an employee of the Central Intelligence Agency;

(2) the Secretary of Transportation, in the case of a member or employee of the Coast Guard when it is not operating as a service in the Navy;

(3) the Board of Commissioners of the United States Soldiers' and Airmen's home, in the case of an employee of the United States Soldiers' and Airmen's Home; and

(4) the Secretary of Defense, in all other cases.

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